

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

GENE ALLEN,

Petitioner,

vs.

STATE OF NEVADA, *et al.*,

Respondents.

3:03-cv-00672-LRH-RAM

**ORDER**

On December 16, 2003, this habeas action was dismissed and judgment was entered. (ECF No. 5).

Approximately six years after judgment was entered, petitioner has filed a motion to vacate judgment in this action. (ECF No. 13). The Court construes petitioner's motion as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). Rule 59(e) of the Federal Rules of Civil Procedure provides that any "motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." A motion under Fed. R. Civ. P. 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Herbst v. Cook*, 260 F.3d 1039, 1044 (9<sup>th</sup> Cir. 2001), *quoting McDowell v. Calderon*, 197 F.3d 1253, 1255 (9<sup>th</sup> Cir. 1999). Federal courts have determined that there are four grounds for granting a Rule 59(e) motion: (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening

1 change in controlling law. *Turner v. Burlington Northern Santa Fe R. Co.*, 338 F.3d 1058 (9<sup>th</sup> Cir.  
2 2003).

3 First, petitioner's motion is untimely and may be denied on this ground alone. Second,  
4 petitioner's motion is meritless. This Court properly entered judgment dismissing this action on  
5 December 16, 2003. (ECF No. 5). In his motion to vacate judgment, petitioner has not identified  
6 any intervening change in controlling law, and has not shown that manifest injustice resulted from  
7 dismissal of the action. Petitioner also has not presented newly discovered or previously unavailable  
8 evidence. Petitioner has failed to make an adequate showing under Rule 59(e) to justify granting his  
9 motion to vacate judgment.

10 **IT IS THEREFORE ORDERED** that petitioner's motion to vacate judgment (ECF No. 13)  
11 is **DENIED**.

12 Dated this 4th day of February, 2011.



13  
14  
15 LARRY R. HICKS  
16 UNITED STATES DISTRICT JUDGE  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28